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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. [redacted]

MARY DOE, *et al*, etc.,

Appellants,

— *v.* —

ARTHUR K. BOLTON, Attorney General of the State of Georgia, *et al*, etc.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

MARGIE PITTS HAMES
210 Brighton Road, N. E.
Atlanta, Georgia 30309

REBER F. BOULT, JR.
CHARLES MORGAN, JR.
5 Forsyth Street, N. W.
Atlanta, Georgia 30303

Attorneys for Appellants

Of Counsel:

ELIZABETH ROEDIGER RINDSKOPF
GALE M. SIEGEL
551 Forrest Road, N. E.
Atlanta, Georgia 30312

TOBIANE SCHWARTZ
153 Pryor Street, S. W.
Atlanta, Georgia 30303

November 17 ,1970

IN THE

SUPREME COURT OF THE UNITED STATES

MARY DOE; PETER G. BOURNE; ROBERT HATCHER; LILLAS L. JAMES; JAMES WATERS; CORBETT TURNER; NEWTON LONG; EDWARD LEADER; WILLIAM H. BIGGERS; GEORGE VIOLIN; PATRICIA S. SMITH; JENNIE WILLIAMS; JUDITH BOURNE; SUZANNE DUNAWAY; JOYCE PARKS; LOU ANN IRION; MARY LONG; J. EMMETT HERNDON; SAMUEL L. WILLIAMS; EUGENE PICKETT; RICHARD DEVOR; DONALD DAUGHTRY; JUDITH ZORACH and KAREN WEAVER, residents of the State of Georgia; PLANNED PARENTHOOD ASSOCIATION OF ATLANTA, INC., a Georgia corporation; and GEORGIA CITIZENS FOR HOSPITAL ABORTION, INC., a Georgia corporation, for and on the behalf of all persons and organizations similarly situated,

Appellants,

vs.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; LEWIS R. SLATON as District Attorney of Fulton County, Georgia; and HERBERT T. JENKINS, as Chief of Police of the City of Atlanta, Georgia,

Appellees,

CIVIL ACTION

No. 13676

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinions of the United States District Court for the Northern District of Georgia are not yet reported. The opinion of the Court dated July 31, 1970, is set out in the Appendix, pp. 1a-15a. The judgment of the Court dated August 24, 1970, is set out in the Appendix, pp. 1b-3b. The amended judgment dated October 13, 1970, is set out in the Appendix, pp. 1c-4c.

JURISDICTION

This action was brought under the first, ninth, and fourteenth amendments of the Constitution of the United States and 42 U.S.C. § 1983. Jurisdiction was conferred by 28 U.S.C. §§ 1343, 2201, 2202, 2281 and 2284.

Appellants brought this class action on April 16, 1970, seeking a declaratory judgment that the Georgia abortion statute, *Ga. Code* §§ 26-1201-03 *et seq.*, was unconstitutional and seeking injunctive relief against its enforcement. A Motion for Temporary Restraining Order was denied on May 4, 1970. A statutory three-judge district court was convened and heard oral argument on June 15, 1970. By opinion dated July 31, 1970, judgment dated August 24, 1970, and amended opinion dated October 13, 1970, portions of *Ga. Code* § 1202 were declared unconstitutional. The court, however, refused to enjoin future enforcement of said Code sections. In its original opinion, judgment, and amended opinion the court denied declaratory and injunctive relief as to the remainder of said statute, holding it to be a valid exercise of state authority, additionally, the district court granted a motion to dismiss all plaintiffs except Mary Doe, thereby denying any declaratory and injunctive relief to doctors, nurses, social workers, ministers, and counsellors. This appeal is from the denial of injunctive relief and denial of relief from the remainder of the statute and to the dismissed plaintiffs. Notice of Appeal was filed in the United States District Court for the Northern District of Georgia on September 18, 1970), (Appendix, pp. 1d-2d). An Amended Notice of Appeal was filed November 3, 1970, (Appendix, pp. 1e-2e).

The jurisdiction of the Supreme Court to review the district court's denial of an injunction by direct appeal is conferred by 28 U.S.C. § 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Evans v. Cornman*, 398 U.S. 419, 420 (1970); *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970); *Moore v. Fidelity & Deposit*

Co. 272 U.S. 317, 321 (1926) and *Sterling v. Constantin*, 287 U.S. 378 (1932).[1]

STATUTE INVOLVED

The statute in question is *Ga. Code* §§ 26-1201-03 hereafter referred to as the Georgia abortion statute. Due to the length of the statute, it is set out in the Appendix, pp. 1f-4f. Those sections of the statute declared unconstitutional by the district court are italicized.

QUESTIONS PRESENTED

1. Whether the three-judge court should have enjoined future enforcement of those provisions of the Georgia abortion statute which it declared unconstitutional in order to effectuate its declaratory judgment and to prevent irreparable injury to the rights of the class of pregnant women who seek safe abortions and the class of

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[1]The recent line of cases defining the Court's jurisdiction under 28 U.S.C. § 1253 does not affect this case. *Mitchell v. Donovan*, 398 U.S. 427 (1970), involved an action in which plaintiffs originally asked for injunctive relief to get names on a 1968 ballot. On final determination after the election, the court held that because plaintiffs requested injunctive relief only as to the 1968 election there was no case or controversy and declined to issue a declaratory judgment. On appeal this Court ruled that the order appealed from was no more than a denial of a declaratory judgment. *Gunn v. University Committee to End the War*, 399 U.S. 383 (1970) also involved only a declaratory judgment. There the district court indicated plaintiffs were entitled to an injunction but postponed action pending the next session of the legislature. Thus, there was no order or judgment granting or denying an injunction. The present case is also distinguishable from *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970), *appeal dismissed*, 39 U.S. L.W. 3144 (October 12, 1970). There the three-judge district court issued a declaratory judgment but declined to issue an injunction. The defendant, against whom no injunction was issued, was the appellant. Had the plaintiff below, whose request for injunctive relief was denied, appealed that decision, the Supreme Court would have had jurisdiction. Here plaintiffs' request for temporary restraining order and prayer for injunctive relief were expressly denied (Opinion dated July 31, 1970, p. 14-a, and Judgment dated August 24, 1970, p. 3-b). This is an "appeal . . . from an order . . . denying . . . an interlocutory or permanent injunction . . . ." 28 U.S.C. § 1253.

physicians who are forced to refuse such women this medical service because of a reasonable fear of prosecution.

2. Whether the remaining sections of the Georgia abortion statute, as to which the three-judge court denied declaratory and injunctive relief, and which by allowing abortions only when a doctor finds it "necessary" and only after cumbersome procedures without due process standards (1) infringe upon the right of appellant-physicians and members of their class to practice their profession without unreasonable state interference; (2) fail to provide sufficient warning as to the conduct proscribed; and (3) infringe upon the right of appellant Mary Doe and members of her class to decide when to bear children in violation of constitutional guarantees of due process and equal protection.

3. Whether appellant-physicians, nurses, social workers, ministers, and family planning and abortion counselling organizations have sufficient "collision of interest" to challenge the Georgia abortion statute.

STATEMENT OF THE CASE

Mary Doe[2] is a 22 year old woman who was approximately eleven weeks pregnant at the time the complaint was filed in this case. Mrs. Doe and her husband were unemployed, their marriage had been unstable, and during the pendency of this suit, her husband abandoned her. Mrs. Doe sought to terminate her pregnancy because she was emotionally and economically unable to care for and support another child. She is the mother of three other children; her third child was placed with adoptive par-

[2] The facts set forth herein are taken from the complaint, unless otherwise specified, which was taken as true. The court allowed this action to be prosecuted in this fictitious name so as to avoid embarrassment to the plaintiff. Even though the time passed in which Mrs. Doe could have been safely aborted, the court proceeded to resolve the issues on behalf of the class and did not require the substitution of another pregnant plaintiff.

ents at birth and the other two children were removed from her custody by state authorities because of her inability to care for them.

Mrs. Doe applied for an abortion at Grady Memorial Hospital in Atlanta.[3] After a period of three weeks, she was notified that her application had been denied by the hospital's abortion committee because she did not come within one of the three reasons specified in the Georgia abortion statute. This class action was filed in the United States District Court on April 16, 1970, seeking injunctive and declaratory relief based on the unconstitutionality of the statute. Mrs. Doe's application for temporary relief was denied by order dated May 4, 1970.[4]

Appellant-physicians who are obstetricians, gynecologists, psychiatrists, medical school professors and general practitioners of medicine, brought this action on their behalf and on behalf of members of their profession, seeking to declare the statute an unconstitutional infringement on the practice of their profession and the physician-patient relationship, and further asserted the statute unconstitutionally vague in violation of due process requirements. Appellant-physicians are regularly called upon by their patients to perform or arrange for medically induced abortions. Appellants desired to perform or arrange this medical service for their patients, but felt constrained from doing so because of the lack of clarity of the Georgia abortion statute, its criminal sanctions against abortions not authorized by its terms, and the re-

[3] This is the public hospital which furnishes free medical care to indigent residents of Atlanta.

[4] A subsequent application for an abortion through private physicians to a private hospital was approved, but Mrs. Doe did not have funds with which to pay her hospital bill in advance so she was unable to obtain an abortion at the private hospital. (Answers to interrogatories filed June 15, 1970.) Also, she was financially unable to travel to some other state which has less restrictive interpretation of abortion limitations. Her remaining alternatives were to continue her pregnancy or risk her life and health at the hands of a non-medical criminal abortionist.

lated threat of revocation or suspension of their license to practice medicine.[5]

Defendants below raised the issue of "standing" and "justiciability" of the controversy as to the physicians, nurses, ministers, social workers, and organizations. The court found that all plaintiffs had standing, but that only Mary Doe had sufficient "collision of interest" to present a justiciable controversy.

As to the merits of Mary Doe's class action, the three-judge court held that "the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy." (Appendix, p. 11a). The court ruled that (reasons for an abortion may not be proscribed, but that the quality of the decision as well as the manner of its execution are properly within the realm of state control . . ." (Appendix, p. 13a). Thus, the portion of the statute which allowed only three reasons for abortion (impairment of health of the woman, rape, or fetus malformation) was declared unconstitutional but the remainder of the statute was declared to be a "proper exercise of state power." The remainder of the statute is basically the procedural steps for obtaining an abortion and provisions as to who can perform abortions and where abortions may be performed.

Appellants assert here that the statute as revised by the court below remains as a barrier to the constitutional rights asserted and will obstruct and interfere with such rights unless declaratory and injunctive relief is granted to all plaintiffs.

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents important federal questions which have not been resolved by this Court. The three-judge court's refusal to grant injunctive relief against enforce-

[5] *Ga. Code* § 84-916.

ment of portions of a statute declared facially unconstitutional raises important issues for enforcement and vindication of constitutional rights. This Court has not in recent years considered the propriety of injunctive relief against future enforcement of criminal statutes except in the area of first amendment rights. Appellants claimed an infringement on such rights, and a decision of this Court is needed to clarify the availability of injunctive relief based on first amendment and other constitutional rights.

Defense of criminal prosecutions in the state courts by physicians is a wholly inadequate means of determining the rights of physicians to perform abortions and the rights of women to decide when to have children. Due to inherent time limitations of pregnancy, there is no time to have the correctness of a physician's decision reviewed prior to performing the act which results in criminal liability, and such would be an unworkable procedure in any event. Thus, appellant-physicians and members of Mary Doe's class need to have the questions presented in this case resolved.

The substantive issues here are of national import and affect the lives and health of thousands of people each year. This case involves some issues raised in four other cases which have been docketed in this Court, but because an entirely different and more modern abortion statute[6] is involved in this case, oral argument and a plenary review by the Court is warranted. Because of the limited function of the Jurisdictional Statement and the complexity of issues, appellants will not attempt to develop all arguments in depth but will show the questions presented are substantial.

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[6] The Georgia statute is modeled after the American Law Institute MODEL PENAL CODE § 230.3, *et seq.* (Proposed Official Draft 1962). The other cases involve the older statutes which permitted abortions only to "save" or "preserve the life" of the woman. See n. 11-13 for other cases docketed in this Court.

I.

THE THREE JUDGE COURT SHOULD HAVE ENJOINED FUTURE ENFORCEMENT OF THOSE PROVISIONS OF THE GEORGIA ABORTION STATUTE WHICH IT DECLARED UNCONSTITUTIONAL BECAUSE AN INJUNCTION WAS NECESSARY TO EFFECTUATE THE DECLARATORY JUDGMENT AND TO PREVENT IRREPARABLE INJURY TO IMPORTANT FEDERAL RIGHTS TO THE CLASS OF PREGNANT WOMEN WHO ARE OR WILL BE SEEKING ABORTIONS AND THE CLASS OF PHYSICIANS WHO ARE FORCED TO REJECT SUCH WOMEN AS PATIENTS OR FEAR PROSECUTION IF THEY PROVIDE THE MEDICAL SERVICES THEY DEEM NEEDED.

A. The subject matter of this appeal involves substantial federal constitutional questions.

On the merits below, appellant Mary Doe argued successfully that the concept of personal liberty included the right to privacy in deciding when to bear children and that the right to plan one's family included the right to terminate an unwanted pregnancy. The court based its decision primarily on *Griswold v. Connecticut*, 381 U.S. 479 (1965), without adopting either the majority view of the penumbral zone of privacy created by several fundamental guarantees or the concurring opinion concept of personal liberty preserved by the ninth amendment. The statute, insofar as it specified reasons for which an abortion was permitted, was declared overbroad by the court stating:

> This the State may not do, because such action unduly restricts a decision sheltered by the constitutional right of privacy. (Appendix p. 13a)

The constitutional right of privacy which includes a right to terminate an unwanted pregnancy presents a substantial federal constitutional question of national import and importance. Appellants assert that the judgment below, insofar as it recognizes the right of privacy, should be affirmed and this right accorded constitutional status by this Court.

The status of abortion as a criminal act has resulted in a state and national health problem of immense proportions. Because termination of pregnancy by physicians has virtually been prohibited by law, women have turned to self-induced "coat hanger" abortions or placed themselves in the untrained hands of illegal abortionists. In Georgia alone, there were 205 reported deaths from illegal abortion in the years 1950 to 1969,[7] and a number of these occurred after Georgia had adopted what is characterized as a "liberal" abortion statute. Since these abortions are illegal and subject those performing them to imprisonment for up to ten years there is no way to determine accurately the number of deaths per year they cause, much less to establish the number of women risking such death. Researchers in this area estimate that in the United States 200,000 to 1,000,000 abortions are illegally induced each year.[8] Additionally there are authoritative estimates of 750,000 to 1,000,000 unwanted children born each year. The multitude of psychological, emotional, economic, and sociological problems resulting to the unwilling parents and unwanted children could not possibly be discussed here, but these problems must be

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[7] Rochat, Tyler & Schoenbucher, *An Epidemiological Analysis of Abortion in Georgia*, in U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, PUBLIC HEALTH SERVICE REPORT (98th Annual Meeting, American Public Health Assoc., Houston, Texas; Oct. 26-30, 1970), Table 1.

[8] For estimates, see Fisher, *Criminal Abortion*, in ABORTION IN AMERICA 3-6 (1967); M. CALDERONE, ABORTION IN THE UNITED STATES 1970), Table 1.

recognized as part of the impact of our abortion laws. One must conclude that abortion statutes, such as the Georgia statute, affect the conduct, health, and happiness of literally millions of Americans each year.

The national significance of the issues involved in this case may be seen from activities in three major areas. First, the position of the medical profession has changed in an effort to rid our country of this health problem. On June 25, 1970, the House of Delegates of the American Medical Association adopted a policy permitting licensed physicians to perform abortions in hospitals or an approved clinical setting upon consultation with two other physicians.[9] The Executive Board of the American College of Obstetricians and Gynecologists in August, 1970, similarly adopted a more liberal policy permitting the performance of an abortion based on the decision of a physician or his patient. If the decision is based on a physician's recommendation then another physician is to be consulted; if the procedure is done on the request of the woman nothing other than her written request is necessary under this new policy.

Secondly, several state legislatures have amended the abortion statutes on their books, most of which had been enacted in the mid-nineteenth century and allowed abortions only to preserve the life of the mother. Since 1967 twelve states, including Georgia, adopted abortion statutes similar to the provisions of the 1962 Draft of the MODEL PENAL CODE, and in 1970, Alaska, Hawaii, and New York removed substantially all limitations on abortions by physicians during the early stages of pregnancy. Recently the Commissioners on Uniform State Laws issued a Second Tentative Draft of a UNIFORM ABORTION ACT which would allow abortions by licensed physicians "within 24 weeks after the commencement of pregnancy,

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[9] 213 J.A.M.A. 359 (July 20, 1970).

or if after 24 weeks . . ." for the reasons permitted under the MODEL PENAL CODE.

The third area involves recent litigation in state and lower federal courts of the constitutionality of state abortion statutes. The Supreme Court of California, in *State v. Belous*, 71 Cal. 2d 996, 458 P. 2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970), was the first court to recognize the constitutional status of a "fundamental right of the woman to choose whether to bear children . . ." finding this right in the line of Supreme Court cases such as *Griswold, supra, Loving v. Virginia*, 388 U.S. 1, 12 (1967), and *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 536, 1942), which recognized a " 'right of privacy' or 'liberty' in matters related to marriage, family and sex." In *Babbitz v. McCann*,[10] a federal three-judge court recognized that a woman had a "basic right reserved to her under the ninth amendment to decide whether she should carry or reject an embryo which had not yet quickened." Another three-judge court, in *Roe v. Wade*,[11] ruled the Texas abortion statute unconstitutional on the ground that such statutes "deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children." These specific holdings, together with similar comments in *United States v. Vuitch*[12] and in numerous other lower court decisions, illustrate the national significance of the fundamental constitutional rights being claimed in this case.

Although this Court will probably hear argument of the *Vuitch* case this term, and three other cases remain

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[10] 310 F. Supp. 293 (E.D. Wis. 1970) (per curiam), *appeal dismissed*, 39 U.S.L.W. 3144 (October 12, 1970), for lack of jurisdiction under 28 U.S.C. § 1253.

[11] 314 F. Supp. 1127 (N.D. Tex. 1970), *appeal docketed* 39 U.S.L.W. 3151, No. 808 (U.S. Oct. 7, 1970).

[12] 305 F. Supp. 1032 (D.D.C. 1969), *ques. of juris. postponed to merits*, 397 U.S. 1061, *further juris. questions propounded*, 399 U.S. 923 (1970).

on the docket (*Roe* and two cases involving the Minnesota abortion statute[18]), it is unlikely that a decision in any of those cases will dispose of the issues involved in this case. The cases presently docketed all involve older type abortion statutes which permit abortions only to "save" or "preserve" the life of the woman, while the Georgia abortion statute is patterned after the MODEL PENAL CODE provisions allowing abortions on the basis of other limited factors. Nor do any of the docketed cases involve, as does this case, a partial invalidation of an abortion statute where the reasons for allowing an abortion have been stricken but the procedural mechanisms for legally reaching such decision have been left intact. Because of these unique features, a decision in this case will be important not only to the citizens of Georgia and the other eleven states having versions of the MODEL PENAL CODE abortion statute but also as guidance to state legislatures throughout the nation in this developing area of constitutional rights.

B. **The three-judge court should have enjoined the future enforcement of those portions of the Georgia abortion statute which it declared unconstitutional.**

This action was brought under 28 U.S.C. §§ 2281-84 and 48 U.S.C. § 1983. There was no pending state court proceeding against any of the plaintiffs below. An injunction was denied, however, "on the same basis as such a prayer would be denied were a state proceeding actually in progress...." The court relied upon *City of Greenwood v. Peacock*, 384 U.S. 808, 828 (1968); the quotation excerpted by the court is

> the vindication of defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted . . . that

[18] *Doe v. Randall*, 314 F. Supp. 32 (D. Minn. 1970), *appeal docketed sub nom, Hodgson v. Randall*, 39 U.S.L.W. 3115, No. 728 (U.S. Sept. 22, 1970); and *Hodgson v. Minnesota*, ——— Minn. ———, (1970), *appeal docketed*, 39 U.S.L.W. 3115, No. 729 (U.S. Sept. 22, 1970).

> those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court.

Reliance on this excerpt is misplaced since the *Peacock* case involved the removal of pending state criminal prosecutions. Certainly federal courts do not enjoin pending state court proceedings except in very limited circumstances because they are expressly prohibited from doing so by the anti-injunction statute, 28 U.S.C. § 2283. But that statute proscribes injunctions "to stay proceedings in a state court." Thus, as this Court has recognized, if there is no state court proceeding the anti-injunction statute is inapplicable.[14]

Congress clearly intended the federal courts to have power to declare state statutes unconstitutional and to enjoin "the enforcement, operation or execution"[15] thereof except in the circumstances to which the anti-injunction statute applies. And this Court has recognized that "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims."[16]

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[14] *Dombrowski v. Pfister*, 380 U.S. 479, 484 n. 2 (1965). Since there were no pending state court proceedings in this case appellants did not have to fit within any exception to the anti-injunction statute. However, it should be pointed out that, as in *Dombrowski*, first amendment rights of free speech and expression are involved in this case in addition to what may be a first amendment based right of privacy. Appellant physicians, nurses, ministers, social workers and counselling organizations alleged that the abortion statute interfered with their counselling women who sought their professional help in obtaining safe, speedy, and adequate medical abortions. Since abortions for economic, social, and many physical and emotional reasons were prohibited by Georgia law, counselling persons as to where such an abortion could be obtained and assisting in arrangements was a possible violation of the criminal conspiracy statute, *Ga. Code* § 26-3201 or could make them an accessory under *Ga. Code* § 26-801.

[15] 28 U.S.C. § 2281.

[16] *Zwickler v. Koota*, 389 U.S. 241, 248 (1967).

In view of this duty and the fact that the three-judge court did honor appellants' choice of a forum to the extent of granting declaratory relief on the merits of their asserted constitutional rights, it is inconsistent with sound judicial policy for the court to have failed to resolve the question with finality. If as the three-judge court's quotation suggests, the vindication of the federal rights of persons in the classes represented by appellants is to be left to the state courts, then it should not be done piecemeal. If despite all reasonable expectations state officials undertake to prosecute a physician for violation of those portions of the Georgia abortion statute declared unconstitutional by the federal court, the court cannot then leave the matter to resolution by the state courts without making a mockery of the judgment won by appellants in the federal forum of their choice.

Where, as here, no state criminal prosecution is pending or immediately threatened, potential friction in federal-state relations is at a minimum. Where the federal court has, in a novel and complex area of constitutional adjudication, declared a state statute unconstitutional, its failure to enjoin enforcement of the invalid statute simply invites friction.

Even in situations in which potential federal-state friction is at its greatest, as in *Dombrowski*, this Court has required enjoining state criminal prosecutions where special circumstances indicate that an erroneous initial application of constitutional statutes by the state will result in irreparable injury to important federal rights. The ephemeral time span which pregnant women have in which to exercise their constitutional right of privacy is a similarly important special circumstance[17] justify-

[17] Reference is made to the petition of Jane Roe to Intervene in this case (September 15, 1970). She was denied an abortion at Georgia Baptist Hospital because she did not come within the reasons prescribed by the hospital. The court ruled that the hospital's adoption

Note 17 Continued on page 15.

ing a coercive order by the federal courts to preclude the possibility of irreparable injury resulting from the delay inherent in allowing an initial state determination.

II.

THE THREE-JUDGE COURT SHOULD HAVE DECLARED THE PROCEDURAL PROVISIONS OF THE GEORGIA ABORTION STATUTE AND ITS FURTHER REQUIREMENT THAT ABORTIONS MAY BE PERFORMED ONLY AT ACCREDITED HOSPITALS UNCONSTITUTIONAL FACIALLY OR IN OPERATION AS VIOLATIVE OF CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION.

A. As a result of the three-judge court's judgment, the Georgia abortion statute is so vague and ambiguous in its terms that it fails to provide sufficient warning of the conduct proscribed thereby violating basic elements of due process guaranteed by the fourteenth amendment.

The statute is set forth in full in the Appendix at pp. 1f-4f and the portion declared unconstitutional is italicized. Excepted from the criminal abortion penalties, under the statute as revised by the court below, are those abortions "performed by a physician duly licensed to practice medicine and surgery . . . based upon his best clinical judgment that an abortion is *necessary* . . . ." (Emphasis added.) Prior to the court's revision, the statute read ". . . based upon his best clinical judgment that an abortion is necessary because: . . ." one of the specified reasons was present, *i.e.*, danger to the life or serious

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Note 17 Continued from page 14.
of standards or reasons was unconstitutional. See Amended Judgment, Appendix p. 3c. Another suit was filed, *Polly Poe v. Fulton-DeKalb Hospital Authority* Civ. No. 14223 (N.D. Ga. Oct. 7, 1970), alleging denial of an abortion and failure to advise the reason for which it was denied. The injunctive relief requested would prevent multiple suits to enforce the court's decision.

and permanent injury to the woman's health; fetal malformation; or rape. Now the test for obtaining an abortion is that a physician must decide an abortion is "necessary" based upon his best clinical judgment. Thus the statute as revised by the court is more restrictive, more ambiguous, and more vague now than it was before. A physician could reasonably fear that an abortion performed by him for economic, family, emotional or other reasons, good and sufficient to the physician and his patient, might not be considered sufficiently "necessary" under the truncated statute to avoid a criminal prosecution. A statute which places one in peril of his life or liberty may not constitutionally require one to guess at its meaning and the conduct proscribed. *Eg., Smith v. California,* 361 U.S. 147, 151 (1959).

B. **The procedural provisions of the Georgia abortion statute declared constitutional by the three-judge court are so costly, time consuming, cumbersome and devoid of fairness as to deny Mary Doe and members of her class the right to decide when to bear children in violation of the right of privacy and in violation of the due process and equal protection guarantees of the United States Constitution.**

Assuming that the district court correctly held that "the decision [to have an abortion is] sheltered by the Constitution . . ." (Appendix p. 13a), the decision may not be so encumbered with procedural requirements that it becomes an empty right or one exercisable only by the wealthy, the educated, the sophisticated, or the persistent who relentlessly pursue their rights. Again, reference must be made to the time limitations on safely terminating a pregnancy. Pregnancy test results are reliable only after approximately eight weeks,[18] yet an abortion must

[18] Physicians measure pregnancy from the first day of the last menstrual period.

be performed within the first twelve weeks if the safest methods are to be used. Thus, a woman has only about four weeks in which to put together the magic procedural combination under the Georgia abortion statute. This combination requires the woman: (1) to show that she is a resident of Georgia;[19] (2) to convince her physician an abortion is "necessary"; (3) to obtain the opinions of two other physicians who agree that an abortion is "necessary"; (4) to get the decision approved by a majority of a hospital's abortion committee (a minimum of three members), although there are no standards limiting the committee's discretion; and (5) to arrange to have the abortion performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals. Since there is no statutory provision for the woman to appear and be heard at a meeting of the hospital abortion committee, her proposing physician must, as a practical matter, become her advocate and present reasons sufficient to convince a majority of the hospital abortion committee of the need for the abortion. Such advocacy usually requires that the proposing physician and his consultants write extensive requests, reports, and detailed charts since again, in practice, it is difficult for the six physicians involved to meet together for a discussion of each case. A more burdensome process can hardly be imagined.[20] *Cf.* the unconstitutionality of cumbersome procedures where other rights are involved, *eg.*, voting, *Harman v. Forsennius*, 380 U.S. 528, 539-44 (1960);

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[19] Without extensive argument, appellants contend that residency is not a rational prerequisite for determining if one needs a medical service. *Cf. Shapiro v. Thompson*, 394 U.S. 618 (1969). Such a limitation prevents emergency treatment for a visitor in Georgia who is unable to return to her home state for such service.

[20] Hospital abortion committees are composed of staff members in the OB-GYN specialty, i.e., one's professional competitors, posing a serious conflict of interest problem. Also, in the smaller cities, it is sometimes impossible to have three committee members and three consultants.

parades and demonstrations, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

Considering the limitations of time in which a meaningful decision must be made, this statutory scheme is completely lacking in procedural due process. As stated above, the woman involved has no right to appear before the hospital abortion committee and be heard, nor does she have a recognized right of appeal from its decision. An action in the courts provides no adequate remedy since that decision is subject to the delays of further appeal. In this regard, it should be pointed out that neither the American Medical Association nor the American College of Obstetricians and Gynecologists policy statements require the approval of a committee, much less the approval of a statutory hospital abortion committee.

A final procedural roadblock to obtaining a legal abortion, which was left in the statute by the three-judge court, is the requirement that abortions be performed only in licensed, accredited hospital facilities. The Georgia Department of Health issues licenses to hospitals, but accreditation is granted only by the Joint Commission on Accreditation of Hospitals, a private organization located in Chicago, Illinois. Of the 214 licensed hospitals in Georgia, only 83 have been accredited.[21] Licensed hospitals are permitted to perform general types of surgery. Accredited hospitals are required to maintain, in addition to operating room facilities, a radiology department and facilities for emergency care of mass casualties,[22] neither of which is relevant to abortion services. This artificial and medically unnecessary statutory limitation on the facilities in which abortions

[21] JOINT COMMISSION ON HOSPITAL ACCREDITATION, ACCREDITED HOSPITALS, Jan. 1, 1970.

[22] STANDARDS FOR HOSPITAL ACCREDITATION, introduction (Dec. 1965), as discussed in Leavy and Charles, *California's New Therapeutic Abortion Act*, 15 U.C.L.A.L. Rev. 1, 5 (1967).

may be obtained further encumbers the right of many residents of Georgia to seek a termination of pregnancy. This additional procedural burden is especially true of indigent women who depend upon the public hospital in the county of their residence but who are unfortunate enough to live in the 103 Georgia counties without an accredited hospital. See map of Georgia which shows counties with accredited hospitals Appendix p. 1g.

The foregoing procedures are costly, involve great expenditure of time by the woman and her physicians and are so burdensome and devoid of fairness as to deprive appellants of basic due process. The actions of hospital abortion committees constitute state action because they are delegated decision making authority under the statute to decide whether an abortion will be performed.

C. The procedural provisions of the Georgia abortion statute declared constitutional by the three-judge court have had the effect in operation of denying equal access to medical services to poor and Negro citizens in violation of the equal protection guaranties of the United States Constitution.

On its face the Georgia statute makes no distinction on the basis of a patient's race, economic status, or social position. Yet, as applied, this statute has systematically come to deny safe medical abortion services to the poor and to the non-white residents of Georgia. Appellants assert that there is a duty on behalf of cities, counties, states, and other governmental bodies which furnish other health services to the indigent to also make abortion services available to the indigent. See *Doe v. General Hospital of the District of Columbia*, No. 24,011 (D.C. Cir. 1970); and *United States v. Vuitch, supra*, 305 F. Supp. at 1035, where such a duty was "declared" even though the court recognized that appropriations would

have to be made. Observance of such a duty is not only being neglected in Georgia, it is being seriously impeded by the remaining requirements of the Georgia abortion statute.

Abortion services have for some time been available to the rich woman; she could travel to other countries and today may travel to New York, California or some other state which has a less restrictive abortion law. And under the Georgia abortion statute, she could usually find without difficulty private physicians and pyschiatrists who would make the necessary examinations to support a finding that termination of pregnancy was necessary to her psychic health. It goes without saying that the majority of women do not enjoy such affluence. Some women lack adequate means to travel to the next county. Such lack of funds, however, controls their access to medical services. The requirement of the Georgia abortion statute that abortion be performed only in accredited hospitals, discussed above, has totally removed the possibility of the less expensive office or clinical abortion facilities in the state.[23]

This creates a situation not unlike having a right to appeal a criminal conviction but not enough funds to pay for a transcript of the trial proceedings necessary to assert such right. Cf. *Gardner v. California*, 393 U.S. 367 (1968); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). As the Court stated in *Griffin* "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has." 351 U.S. at 18-19. Similarly when Georgia had granted a right to terminate an unwanted pregnancy, it may not constitutionally encumber that right

[23] In this regard the three-judge court observed that the State had an interest in preventing establishment of "abortion mills by the occasional opportunistic or unethical practitioner." Surely the court is not referring to specialized medical facilities but rather illegal or non-medical facilities because it will certainly be appropriate to have specialized facilities for this as for other medical services.

with complicated procedures that in practice are available only to the wealthy or the educated.

Not only are the poor people denied equal access to abortion services in Georgia, but statistics also show that whites receive by far the greater number of hospital abortions. During 1968, beginning with enactment of the present Georgia abortion statute in April, 69 whites as compared with only 4 Negroes received abortions; in 1969, the ratio was 147 whites to 21 Negroes; and in 1970 through June, 192 whites compared to 28 Negroes received abortions.[25] Thus, Negro women have received only 11.5 percent of the hospital abortions since enactment of the new law although Negroes represent 28.5 percent of the population. These figures should be considered in conjunction with a racial breakdown of deaths resulting from illegal abortions. Of the 205 reported deaths from 1950 to 1969, 143 or approximately 70 percent were Negro women and during the period 1965 to 1969, 88 percent (22 of 25 deaths) were Negro women.[26] Thus, while the number of legal abortions are increasing, Negro women are receiving a disproportionately small share and at the same time maternal mortality for Negro women is increasing. Even though the statute may not facially deny equal protection or equal access to medical care, these statistics demonstrate such a denial in fact.[27]

What was said by Mr. Justice White in his concurring opinion in *Griswold v. Connecticut, supra,* 381 U.S. at 503, is equally applicable to the abortion statute here:

> [T]he clear effect of these statutes as enforced, is to deny disadvantaged citizens of Connecticut,

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[25] Rochat, n. 7 *supra*, at Table 8.

[26] *Id.* at Table 1.

[27] Concerning the use of statistics to show exclusion of Negroes in the South in other contexts see, *e.g., Whitus v. Georgia,* 385 U.S. 545, 552 n. 2 (1967); *United States v. Jefferson County Bd. of Educ.,* 372 F.2d 836, 887 (1966), *aff'd en banc,* 380 F.2d 385 (5th Cir.), *cert. denied,* 389 U.S. 840 (1967).

> those without either adequate knowledge or resources, to obtain private counselling, access to medical assistance and up-to-date information in respect to proper methods of birth control.... In my view, the statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendement. (Citations omitted.)

The Georgia abortion statute denies women of Georgia access to needed medical services and its procedural requirements impose undue burdens upon those who seek to avail themselves of their right to decide when to bear children. In so doing it contravenes the due process and equal protection guarantees[28] of the fourteenth amendment. It should be declared unconstitutional and its enforcement enjoined.

III.

APPELLANT-PHYSICIANS, NURSES, SOCIAL WORKERS, MINISTERS, AND FAMILY PLANNING AND ABORTION COUNSELLING ORGANIZATIONS HAVE SUFFICIENT "STANDING" AND "COLLISION OF INTEREST" TO CHALLENGE THE GEORGIA ABORTION STATUTE.

The court ruled that all plaintiffs had "standing" to bring the action contesting the constitutionality of the Georgia abortion statute, noting the possibility that if

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[28] Other equal protection considerations are involved in *Ga. Code* § 26-1202(e) which permits a hospital to elect not to perform abortions. It is recognized that individual doctors should have this right, as a matter of conscience, but hospitals are fictitious legal entities and not having a conscience as such can lay no claim to exemption for that reason. Public or quasi-public hospitals occupy "state action" status and have an equal protection "duty." Private hospitals receiving Hill-Burton or Medicaid funds would likewise be subject to equal protection responsibilities, *cf. Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), *cert. denied* 376 U.S. 938 (1964).

social workers, ministers, etc., counseled obtaining an abortion not permitted under the statute they could be prosecuted for conspiracy. However, in the absence of a pending prosecution or immediate threat of prosecution against the doctors, social workers, ministers, and other parties desiring to counsel abortions, the court held that there was no adequate "collision of interests" or "exigent adversity" to give the challenge of these parties to the statute the requisite justicibility.

Appellants urge that the reliance of the district court on *Poe v. Ullman*, 367 U.S. 497 (1961) and *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947) in reaching its conclusion was not well founded. Both of those cases involved statutes as to which a long history of failure by the state to seek prosecutions showed the absence of any real threat of enforcement and therefore the absence of any real controversy between the parties. The Georgia abortion statute, however, has not been a dead formality on its books. Numerous persons have been prosecuted and convicted under the abortion statute that preceded the 1968 Georgia statute.[29] And under *Ga. Code* § 26-801, one who intentionally counsels a crime or otherwise aids and abets in its commission is made a party thereto subject to conviction for such action. In the circumstances of an actual history of state enforcement of its abortion statutes, appellants who desire, in the performance of their professions, to counsel abortions have

> "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962), as cited in *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

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[29] See for example, *White v. State*, 114 Ga. App. 437 151 S.E.2d 832 (1966); *Persons v. State*, 93 Ga. App. 314 91 S.E.2d 358 (1956).

In any event, a failure of the state actively to prosecute appellants and members of their classes who desire to counsel abortion does not alleviate their fear of prosecution for doing so. As this Court stated in *Dombrowski:*

> So long as the statute remains available to the State the threat of prosecution of protected expression is a real and substantial one. 380 U.S. at 494.

So in this case, the real and substantial threat of prosecution for counseling abortions gave appellants a meaningful adversity[30] adequate to place their claim in the context of controversy necessary for judicial resolution. Further, as to the physicians, extensive encroachment on their rights to practice their profession without state interference has already been discussed and this presents concrete adverseness assuring adequate presentation of the issues.

Here an important issue as to justiciability or collision of interest is raised. This Court should review the decision below and lay to rest the uncertainty which arises out of *Poe* and *Mitchell.*

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[30] This Court found no lack of adversity in *Epperson v. Arkansas,* 393 U.S. 97 (1968) although, as Justice Black pointed out, the statute which was there said to impose a risk of prosecution had never been enforced against anyone in its forty year existence.

CONCLUSION

For the reasons set out in this Jurisdictional Statement, the Court should note probable jurisdiction, and set the case down for plenary consideration with Briefs on the merits and oral argument.

Respectfully submitted,

MARGIE PITTS HAMES
210 Brighton Road, N. E.
Atlanta, Georgia 30309

REBER F. BOULT, JR.
CHARLES MORGAN, JR.
5 Forsyth Street, N. W.
Atlanta, Georgia 30303

Attorneys for Appellants

Of Counsel:

ELIZABETH ROEDIGER RINDSKOPF
GAIL SEIGEL
551 Forest Road, N. E.
Atlanta, Georgia 30312

TOBIANE SCHWARTZ
153 Pryor Street, S. W.
Atlanta, Georgia 30303

APPENDIX

APPENDIX "A"

OPINION OF UNITED STATES DISTRICT COURT GRANTING DECLARATORY JUDGMENT AND DENYING INJUNCTIVE RELIEF

JULY 31, 1970

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

MARY DOE, et al,
Plaintiffs

vs.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; LEWIS R. SLATON, as District Attorney of Fulton County, Georgia; and HERBERT T. JENKINS, as Chief of Police of the City of Atlanta,
Defendants

CIVIL ACTION

NUMBER 13676

PER CURIAM.

This is an action for declaratory and injunctive relief brought pursuant to 28 U.S.C.A. §2201 and 2202, and 42 U.S.C.A. §1983 and 28 U.S.C.A. §1343. It is a class action attacking Ga. Code Ann. §26-1201, *et seq.* (1969) Georgia's "Abortion Act."

Plaintiffs claim to represent four sub-classes: pregnant women, single or married, wishing legal abortions; licensed physicians who wish to perform or counsel performance of legal abortions; registered nurses who desire to participate in performing or counsel performance of legal abortions; and ministers and social workers who wish to be free to advise abortion in counselling pregnant women.

Plaintiffs seek an order declaring Georgia's Abortion Statute unconstitutional and enjoining its enforcement on various grounds:

(1) the Statute is unconstitutionally vague and indefinite on its face and as applied, failing to provide sufficient warning of the conduct proscribed, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

(2) Georgia's Abortion Statute unconstitutionally abridges a woman's right to decide to terminate an unwanted pregnancy, in restricting that fundamental liberty without an overriding compelling state interest;

(3) the Statute unconstitutionally restricts the right of the physicians, nurses, ministers and social workers to practice their professions;

(4) Georgia's Abortion Statute produces discrimination against poor and non-white women in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

PENDING MOTIONS

Arthur K. Bolton, sued in his official capacity as Attorney General of Georgia has moved for an order dismissing the claim against him on the ground that no relief

could be granted against him since he is not charged generally with the enforcement, application or administration of the Georgia criminal statutes.

As plaintiffs observe, Article VI, § X, Par. II of the Georgia Constitution, Ga. Code Ann. §2-4502 (1933) requires the Attorney General to represent the State in any civil or criminal case when required by the Governor. Furthermore, he may be required to give the Governor advisory opinions on the abortion statute. Ga. Code Ann. §40-1602 (1933). Finally, the Attorney General is head of the Department of Law, which is vested with authority and jurisdiction in all matters of law relating to governmental departments, boards and agencies. Ga. Code Ann. §40-1614 (1943). The Attorney General has sufficient connection with enforcement of the statutes attacked to justify retaining him as a party.[1] See Arneson v. Denny, 25 F.2d 993 (W.D. Wash. 1928); Jackson v. Colorado, 294 F. Supp. 1065, 1072 (D. Colo. 1968); James v. Almond, 170 F. Supp. 331, 341-342 (E.D. Va. 1959); International Longshoremens' & W. U. v. Ackerman, 82 F. Supp. 65, 124 (D. Haw. 1948), *rev'd* on other grounds 187 F.2d 860 (9th Cir. 1951); Revins v. Prindable, 39 F. Supp. 708, 710 (E.D.Ill. 1941). Accordingly, that motion is denied.

The Attorney General has also objected to interrogatories which plaintiffs served for answer by a witness, Roger Rochat, M. D. In view of the disposition of this case made below, no ruling on this motion is necessary.

The motion of Ferdinand Buckley, Esquire, for reconsideration of the revocation of his appointment as guardian *ad litem* will be dealt with in connection with the discussion under MERITS below.

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[1] The Court is also aware that the Attorney General regularly interprets State criminal laws and decisions in published opinions and circulars to State judges and law enforcement officers.

The motion of the National Legal Program on Health Problems of the Poor to submit a brief as *amicus curiae* is granted.

The defendant Lewis R. Slaton, District Attorney of Fulton County, filed motions seeking orders requiring disclosure of plaintiff's identity, granting a continuance for discovery for a reasonable time thereafter, and requiring plaintiff to submit to a physical and mental examination. In view of the reasons for which it is held that the complaint of this plaintiff presented a justiciable controversy, these motions are directed toward obtaining information which is not relevant to the case. Accordingly, they are denied.

JURISDICTION

A. *Substantial Constitutional Question.*

A three-judge court was convened pursuant to 28 U.S.C.A. § 2281 and 2284. Such action is proper where plaintiffs attack the constitutionality of a state statute, raising a substantial constitutional question, and seek equitable relief against its enforcement. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U. S. 713, 715 (1962).

Plaintiffs here attack the constitutionality of Ga. Code Ann. § 26-1201 *et seq.* (1969) on the grounds that it infringes rights protected by various Amendments to the United States Constitution. They seek an injunction against enforcement. In light of recent cases on the subject of the Constitutional right to an abortion, this Constitutional question appears substantial. *See* Roe v. Wade, ——— F. Supp. ——— (N. D. Tex., No. 3-3690-B, June 17, 1970); Doe v. Randall, ——— F. Supp. ——— (D. Minn., No. 3-70-Civ.-97, May 19, 1970); Doe v. Scott, ——— F. Supp. ——— (N.D. Ill., No. 70-C-395, March

27, 1970); Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970); United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969), *app. docketed*, No. 1155 (February 5, 1970); California v. Belous, 71 Cal. 2d 991, 458 P.2d 194 (1969), *cert. den.* 397 U. S. 915 (1970).

B. *Justiciability.*

Standing

By motion to dismiss, Lewis R. Slaton, District Attorney of Fulton County, contends that all plaintiffs other than Mary Doe lack standing to maintain this action. The basis for the claims of these plaintiffs is that because they are not free to perform or counsel the obtaining of abortions, they are unconstitutionally restricted in the practice of their professions.

There are certainly instances in which any of these plaintiffs would have standing to claim a constitutional right to practice his profession, and infringement thereof. For instance, few would dispute that a social worker being prosecuted for conspiracy because he (or she) counselled obtaining an abortion, and referred the client to a physician for the abortion, would have standing to seek a declaratory judgment of his (or her) asserted constitutional right and infringement thereof. *See* Griswold v. Connecticut, 381 U. S. 479 (1965).

But absent prosecution or indictment, that these plaintiffs do have standing is more difficult to see. Whether their claim is otherwise justiciable is irrelevant. Flast v. Cohen, 392 U. S. 83, 100 n. 21 (1968). The sole issue is whether there is a logical link between the status they assert (physician, nurse) and the claim they seek adjudicated, or between their status and both the type of enactment attacked and the nature of the constitutional infringement alleged. 392 U. S. at 102.

Under either test, all the plaintiffs have standing. As physicians, nurses, ministers or social workers they attack a criminal statute potentially applicable to them, on the grounds that it unconstitutionally restricts their right to practice. Accordingly, the motion to dismiss for lack of standing is denied.

Collision of Interests

Article III of the United States Constitution limits the jurisdiction of the federal courts to cases and controversies. And it is well established that in actions for declaratory judgments, a District Court may not render an advisory opinion on the constitutionality of a state statute. Rather there must be "exigent adversity," an actual controversy in which the constitutionality of the statute is drawn into question in a truly adversary context. *See* Golden v. Zwickler, 394 U. S. 103, 108 (1969); Poe v. Ullman, 367 U. S. 497 (1961); United Public Workers of America v. Mitchell, 330 U. S. 75, 89 (1947).

Most akin to the instant case is Poe v. Ullman, 367 U. S. 497 (1961). There, a married couple, a married woman and their physician sought a declaratory judgment that Connecticut's statutes prohibiting the use of contraceptive devices and the giving of medical advice in the use of such devices violated plaintiffs' Fourteenth Amendment rights, depriving them of life and liberty without due process of law. None of the plaintiffs had been indicted or prosecuted under the statutes. There had been only one recorded prosecution for violation of the statutes in the seventy-five years since their enactment, and that single instance occurred twenty years before the declaratory judgment action was brought. The Supreme Court suggested that the lack of a pending prosecution or immediate threat of such prosecution against the particular plaintiffs made the claims non-justiciable, citing United Public Workers of America v. Mitchell, 330 U. S.

75 (1947). 367 U. S. at 501. But the Justices went on to find that the lack of recorded prosecutions, the unchallenged, open, ubiquitous public sales of contraceptive devices showed a deeply embedded State policy against enforcement, amounting to a tacit agreement not to prosecute violators of the statutes. The majority therefore held:

> "It is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting." 367 U. S. at 507.

However, these three cases seem precedent for the proposition that in the absence of a pending or threatened indictment or prosecution of the particular plaintiffs bringing a declaratory judgment action, a federal court cannot consider the constitutionality of the challenged criminal statute.

However in 1968, the Supreme Court decided Epperson v. Arkansas, 393 U. S. 97 (1968), in which a public school teacher argued that the Arkansas statute prohibiting the teaching of evolution was unconstitutional. There was no pending or threatened indictment or prosecution against the teacher. There was no record of any prosecutions under the challenged statute. The teacher's dilemma was solely that (1) the new biology textbooks she was supposed to use in the approaching term contained a chapter on evolution, and (2) her action for a declaratory judgment in state court, granted on the trial level, had been reversed by the Arkansas Supreme Court. The United States Supreme Court majority reached the merits and reversed the decision of the Arkansas Supreme Court in an opinion which summarily brushed aside the question of justiciability. 393 U. S. at 101-102.

Apparently, then, the majority felt that the appeal presented a "substantial controversy . . . of sufficient immediacy and reality." Golden v. Zwickler, 394 U. S. 103, 108 (1969).

In the instant case, the plaintiffs Mary Doe alleges that having properly applied to the Abortion Committee of Grady Memorial Hospital for a legal therapeutic abortion allowed by Ga. Code Ann. § 26-1202 (1969), she was denied an abortion solely on the grounds that her present situation did not come within the terms of Ga. Code Ann. § 26-1202(a)(1)(1969).

Georgia's Abortion Act defines a criminal abortion as the act performed by a person who administers a substance or uses an instrument or other means with intent to produce a miscarriage or abortion. Ga. Code Ann. § 26-1201 (1969). However, Ga. Code Ann. § 26-1202(a) establishes three circumstances under which an abortion shall not be considered a criminal abortion. And Ga. Code Ann. § 26-1202(b)(1969) prescribes procedure which *must* be followed if an abortion is to be authorized by or performed under 1202(a).

Ga. Code Ann. § 26-1202(b)(1969) provides in relevant part:

> "No abortion is authorized or shall be performed under this section unless each of the following conditions is met:
>
> * * *
>
> (6) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and

> its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

Thus, the denial of plaintiff's application for an abortion, on the grounds alleged, was not the decision of a private physician declining to render professional services, occasioned by the mere existence of Georgia's Abortion Act. The statute confers upon the hospital committee power to grant or deny abortions. A decision denying an application for abortion on the ground that the woman's situation does not fall within one of the three enumerated exceptions is an exercise of that power, which allegedly violated plaintiff's constitutional rights. To this extent then, this staute has been invoked against the plaintiff Mary Doe, causing an alleged constitutional deprivation. Here, there has been actual interference with a claimed constitutional right by the decision of a body which the State has vested with power to grant or deny legal abortions. These circumstances put plaintiff and the defendants on opposite sides of a very real and lively controversy, amendable to judicial resolution.

Accordingly, it appears that Mary Doe's complaint, in this context, presents a justiciable controversy. Since the claims of the other plaintiffs do not stand in such a posture, the Attorney General's motion to dismiss must be granted to that extent.

C. *Exhaustion.*

There is no merit to the defendant Slaton's motion to dismiss for failure to exhaust state remedies. It does not appear that there are any administrative remedies for the denial by a hospital committee of an application for an abortion. And however desirable such a requirement

might be for orderly judicial administration, there is no requirement that a litigant in federal court exhaust state judicial remedies, where he is asserting a claim in proceedings other than *habeas corpus* involving a subject over which the federal and state courts have concurrent jurisdiction. As will appear below, the instant case does not involve granting injunctive relief.

THE MERITS

Plaintiff asserts that certain cases leading up to and following Griswold v. Connecticut, 381 U. S. 479 (1965) establish a Constitutional right to privacy broad enough to encompass the right of a woman to terminate an unwanted pregnancy in its early stages, by obtaining an abortion. *See* Stanley v. Georgia, 394 U. S. 557 (1969); Loving v. Virginia, 388 U. S. 1 (1967); Skinner v. Oklahoma, 316 U. S. 535 (1942); Olmstead v. United States, 277 U. S. 438, 478 (1928) (dissenting opinion of Mr. Justice Brandeis); Pierce v. Society of Sisters, 268 U. S. 510 (1925); Meyer v. Nebraska, 262 U. S. 390 (1923). While the Court agrees that the breadth of the right to privacy encompasses the decision to terminate an unwanted pregnancy, we are unwilling to declare that such a right reposes unbounded in any one individual. Rather, we are of the view that although the state may not unduly limit the reasons for which a woman seeks an abortion, it may legitimately require that the decision to terminate her pregnancy be one reached only upon consideration of more factors than the desires of the woman and her ability to find a willing physician.

In Griswold v. Connecticut, 381 U. S. 479 (1965), the Supreme Court held that the decision to use contraceptive devices is an aspect of a relationship lying within a penumbral zone of privacy created by several fundamental constitutional guarantees, and that a state law forbidding the use of such devices unduly invades that area of

protected freedoms with maximum destructive effect upon that relationship. 381 U. S. at 485. In a concurring opinion, Mr. Justice Goldberg differed with the majority only to the extent of stipulating that the right to marital privacy is encompassed in his concept of personal liberty because of the Ninth Amendment, rather than because of penumbral emanations of specific constitutional guarantees.

For whichever reason, the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy.[2] Like the decision to use contraceptive devices, the decision to terminate an unwanted pregnancy is sheltered from state regulation which seeks broadly to limit the reasons for which an abortion may be legally obtained. However, unlike the decision to use contraceptive devices, the decision to abort a pregnancy affects other interests than those of the woman alone, or even husband and wife alone.

Once conception takes place and an embryo forms, for better or for worse the woman carries a life form with the *potential* of independent human existence.[3] Without

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[2] We see no connection between this theory and the claimed unlimited right of a woman "to use her body in any way she wishes" read into Griswold by some. There are obvious limitations to the latter such as self abuse, *e.g.* disease, drugs, suicide, etc. and the rights of others in which the state clearly has an interest. Any such theory in its ultimate is flatly rejected.

[3] This view of the impact of conception on the decision not to have children implies that the distinction between a quick and unquick fetus, and even that between embryo and fetus is not relevant here.

And since the Court does not postulate the existence of a new being with federal constitutional rights at any time during gestation, the motion of Mr. Ferdinand Buckley for reconsideration of the order revoking his appointment as guardian *ad litem* for the embryo (or fetus) is denied. Mr. Buckley's motion to intervene in such capacity is also denied. However, he has the Court's appreciation for his participation in this litigation as *amicus curiae*.

positing the existence of a new being with its own identity and federal constitutional rights, we hold that once the embryo has formed, the decision to abort its development cannot be considered a purely private one affecting only husband and wife, man and woman.

A potential human life, together with the traditional interests in the health, welfare and morals of its citizenry under the police power, grant to the state a legitimate area of control short of an invasion of the personal right of initial decision.

The whole thrust of the present Georgia statute[4] is to treat the problem as a medical one. Such approach is reasonable and seemingly sound inasmuch as medical practitioners are in the best position by virtue of training to judge concurrently the basis as well as the risk inherent in such a decision. In this respect, the state moreover has a legitimate interest in seeing to it that the decision—personal and medical—is not one undertaken lightly and without careful consideration of all relevant factors, whether they be emotional, economic, psychological, familial or physical. For example, the legislature might require any number of conditions such as consultation with a licensed minister or secular guidance counselor as well as the concurrence of two licensed physicians or any system of approval related to the quality and soundness of the decision in all its aspects. It certainly has a clear right to circumscribe a decision made by a woman alone or by a woman and a single physician and to guard against the establishment of transient "abortion mills" by the occasional opportunistic or unethical practitioner and the concomitant dangers to his patrons and the public. Such controls and requirements, so long as they do not restrict the reasons for the initial decisions and do not violate the

[4] Apparently patterned after the American Law Institute, Model Penal Code §230.3 (Proposed Official Draft, 1962).

Due Process and Equal Protection Clauses of the Fourteenth Amendment, are properly within the sphere of legislative discretion. In that respect, where abortions may be obtained only from licensed physicians and surgeons, and only after psychiatric consultation, the mere fact that physicians and psychiatrists are more accessible to rich people than to poor people, making abortions more available to the wealthy than to the indigent, is not in itself a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Cf.* Dandridge v. Williams, 397 U. S. 471 (1970); MacQuarrie v. McLaughlin, 294 F. Supp. 176 (D. Mass. 1968), *aff'd* 394 U. S. 456 (1969).

Moreover, there is an overriding interest in the manner of performance as well as the quality of the final decision to abort. Obvious need for control through licensing, sanitation requirements and proper medical standards in the execution of a legal abortion are examples. Again such decisions address themselves to legislative decision based upon informed judgment.

Having decided that the reasons for an abortion may not be proscribed, but that the quality of the decision as well as the manner of its execution are properly within the realm of state control, the present statute must be examined in such light.

Rather than regulating merely the quality of the decision to have an abortion, and the manner of its performance, the Georgia statute also limits the number of reasons for which an abortion may be sought. This the State may not do, because such action unduly restricts a decision sheltered by the Constitutional right to privacy. *See* Griswold v. Connecticut, 381 U. S. 479 (1965); California v. Belous, 71 Cal. 2d 991, 458 P. 2d 194 (1969), cert. den. 397 U. S. 915 (1970). The question becomes a matter of statutory overbreadth.

Based upon the above, the court finds the following portions of George Code §26-1202 to be in violation of the constitutional rights of petitioner:

A. Section (a) beginning with the word "because" on line 5 and through subsection (a)(3) in its entirety.

B. Section (b) subsection (3) beginning with the word "because" on line 6 and through the end of said subsection.

C. Section (b) subsection (6) in its entirety.

D. Section (c) in its entirety.

There being no showing to the contrary, the court further finds the remainder of said Code §26-1202 to constitute a proper exercise of state power within the context of this opinion.[5]

An appropriate formal declaratory judgment may be presented upon request of any party.

ABSTENTION

It is recognized that there is no pending state court proceeding against which the injunction prayed by plaintiff would operate. Nevertheless, the request for injunctive relief is denied, on the same basis as such a prayer would be denied were a state proceeding actually in progress:

> "... the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted ... that those rights will inevitably be denied by

[5] It is not thereby implied that those provisions constitute the only or best means of state control. On the whole, the present system appears unnecessarily cumbersome, a potential hazard under due process and equal protection considerations.

the very act of bringing the defendant to trial in the state court." City of Greenwood v. Peacock, 384 U. S. 808, 828 (1968).

However under the authority of Zwickler v. Koota, 389 U. S. 241 (1967), the Court has proceeded to issue the declaratory relief, in spite of its unwillingness to broadly enjoin future prosecutions under the Act. Accordingly, plaintiff's request for a declaratory judgment is hereby granted. Judgment shall issue in the form described above.

IT IS SO ORDERED.

This the 31 day of July, 1970.

LEWIS R. MORGAN
United States Circuit Judge

SIDNEY O. SMITH, JR.
United States District Judge

ALBERT J. HENDERSON
United States District Judge

APPENDIX "B"

JUDGMENT OF UNITED STATES DISTRICT COURT
GRANTING DECLARATORY JUDGMENT AND
DENYING INJUNCTIVE RELIEF
AUGUST 24, 1970

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al,
Plaintiff

vs.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; LEWIS R. SLATON, as District Attorney of Fulton County, Georgia; and HERBERT T. JENKINS, as Chief of Police of the City of Atlanta,
Defendants

CIVIL ACTION
NUMBER 13676

JUDGMENT

The action came on for hearing on defendants' motions to dismiss on June 15, 1970, before a three-Judge Court composed of Lewis R. Morgan, United State Circuit Judge, Sidney O. Smith, Jr., and Albert J. Henderson, Jr., United States District Judges.

Plaintiffs' request to introduce evidence in proof of allegations of the complaint was denied; defendants' motions to dismiss were treated as motions for summary judgment; argument was heard on the Court's jurisdiction and the constitutional issues raised. The Court issued its opinion on July 31, 1970.

Having determined that a substantial constitutional question was raised, one which created a justiciable controversy between plaintiff Mary Doe and the defendants, over which question this Court has jurisdiction and which it does not abstain from exercising; and

Having granted plaintiff Mary Doe's request for a declaratory judgment and denied her request for injunctive relief,

Judgment is hereby entered as follows:

1. The following portions of the Criminal Code of Georgia, § 26-1202[1], are declared to be in violation of the constitutional rights of Petitioner Mary Doe, within the context of the aforesaid opinion:

A. Section (a) beginning with the word "because" on line 5 and through subsection (a)(3) in its entirety.

B. Section (b) subsection (3) beginning with the word "because" on line 6 and through the end of said subsection.

C. Section (b) subsection (6) in its entirety.

D. Section (c) in its entirety.

2. The remainder of the said section 26-1202 of the Criminal Code of Georgia is declared to constitute a

[1] It is the intention of this Court that our decision reach the codification of identical provisions of Ga. Code Ann. §26-9925a and corresponding provisions enumerated above if such codification has any force as law.

proper exercise of state power, within the context of t court's opinion.

IT IS THEREFORE ORDERED, that the complaint all plaintiffs except Mary Doe be dismissed; that t above sections of the Georgia Abortion Statute are d clared void on their face for unconstitutional ove breadth; that plaintiffs' application for injunction be di missed; costs of this cause are taxed against defendant

The request for stay of this order pending any appe is denied.

IT IS SO ORDERED.

This the 24th day of August, 1970.

FOR THE PANEL.

SIDNEY O. SMITH, JR.
United States District Jud

APPENDIX "C"

AMENDED JUDGMENT OF UNITED STATES DISTRICT COURT

OCTOBER 13, 1970

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

MARY DOE, et al

vs.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; et al

CIVIL ACTION

NUMBER 13676

Since the Court's opinion of July 31, 1970, several motions have been filed necessitating this opinion and order.

MOTION OF AMICUS CURIAE

Ferdinand Buckley filed a motion on September 3, 1970, to alter or amend the Court's judgment of August 25, 1970, to rule on several of his earlier motions and prayers. Accordingly, that judgment is hereby amended in the following (See FN) respect:

Mr. Buckley's motion for reconsideration of the order revoking his appointment as guardian *ad litem* for the embryo (or fetus), and his motion to intervene in any representative capacity on behalf of the embryo or fetus is denied. This ruling makes it unnecessary, and the Court declines, to rule on the prayers in the answer and counterclaim Mr. Buckley filed before revocation of his appointment as guardian *ad litem*.

MOTIONS OF JANE ROE

Jane Roe petitions for leave to intervene as a plaintiff, moves for a temporary restraining order, and asks that the Court clarify and enforce its opinion of July 31, 1970. Said petition, and accordingly also the motion and the request are denied for two reasons.

First, the Court is informed by counsel for all concerned that Georgia Baptist Hospital has reconsidered its earlier decision and subsequently granted Jane Roe's application for an abortion. Said action renders the petition of Jane Roe moot, there now being no sufficient collision of interests between Jane Roe and the defendants.

Second, Jane Roe's petition to intervene makes it clear that her controversy was with Georgia Baptist Hospital, and only tangentially with the defendants in this case. Under such circumstances there is no showing that Mary Doe—representing the class of pregnant women denied abortions because of the Georgia statute attacked—could not adequately represent the tangential interest of Jane Roe in this action. *See Allen Calculators, Inc. v. National Cash Register Co.*, 322 U. S. 137, 141 (1944); *Durkin v. Pet Milk Co.*, 14 F.R.D. 374 (W.D. Ark. 1953).

In spite of the above, the motion presents an aspect of the case which justifies some amplification of the previous declaratory judgment. The court concludes that this should be done by way of amendment sua sponte. Rule 60(b)(6); *Klapcott v. United States*, 335 U. S. 601 (1948); *Bros. Incorporated v. W. E. Grace Mfg. Co.*, 320 F.2d 594 (5th Cir. 1963).

The problem relates to the role and function of the "abortion committees" in the several hospitals. Ga. Code § 26-1202(5). The thrust of the original opinion was to carry out the apparent intent of the Georgia legislature

by making the ultimate decision on individual abortions a medical one. However, in line with constitutional principles, the ultimate decision cannot be restricted to the three reasons stated in the statute. This left the abortion committee free to decide whether an abortion was "necessary" on the broader medical basis, namely, the totality of circumstances surrounding each patient.

From the motion it is apparent that those committees who have voluntarily adopted the standards promulgated by the American College of Obstetricians and Gynecologists as controlling have placed themselves in the position of being restricted by the same reasons stated in the statute.[1] What is denied directly cannot be accomplished indirectly. It follows that the abortion committees cannot be limited to the stated reasons as the sole basis for approval of an individual abortion, nor can they so limit themselves by the adoption of such standards. Any such action by a hospital committee is declared to be an unconstitutional exercise of delegated power.

In sum, the statutory processes of approval are left standing. The patient is required to obtain the approval of (1) the certifying physician, (2) the two consulting physicians, and (3) the abortion committee of the ad-

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[1] The Georgia statute requires the hospital to apply standards promulgated by the Joint Commission on the Accreditation of Hospitals. No such restrictive reasons for approval of an abortion are contained therein. However, the voluntary standards promulgated by the American College of Obstetricians and Gynecologists in part limit the grounds for abortion to the three stated statutory reasons: injury to health of the mother; danger of grave physical or mental defect to the child; and pregnancy due to rape. Any such limiting restrictions, as seen, must fail. Likewise, lack of consent by the husband, while it may freely be considered by the committee, may not be automatically established as an absolute bar.

By way of additional comment, good faith administration of the statute as now constituted would prohibit a committee from secretly restricting abortions to those statutory reasons, which the court has already deleted. To the contrary, all relevant factors should be considered and an informed medical judgment made.

mitting hospital. Failure to obtain approval at any level necessarily precludes abortion on that application. A majority of the abortion committee shall control its action, whether for approval or for disapproval.

To the extent stated herein, the original opinion is modified.

IT IS SO ORDERED.

This the 13 day of October, 1970.

LEWIS R. MORGAN
United States Circuit Judge

SIDNEY O. SMITH, JR.
United States District Judge

ALBERT J. HENDERSON, JR.
United States District Judge

APPENDIX "D"

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE; PETER G. BOURNE; ROBERT HATCHER; LILLAS L. JAMES; JAMES WATERS; CORBETT TURNER; NEWTON LONG; EDWARD LEADER; WILLIAM H. BIGGERS; GEORGE VIOLIN; PATRICIA S. SMITH; JENNIE WILLIAMS; JUDITH BOURNE; SUZANNE DUNAWAY; JOYCE PARKS; LOU ANN IRION; MARY LONG; J. EMMETT HERNDON; SAMUEL L. WILLIAMS; EUGENE PICKETT; RICHARD DEVOR; DONALD DAUGHTRY; JUDITH ZORACH and KAREN WEAVER, residents of the State of Georgia;
PLANNED PARENTHOOD ASSOCIATION OF ATLANTA, INC., a Georgia corporation; and GEORGIA CITIZENS FOR HOSPITAL ABORTION, INC., a Georgia corporation, for and on behalf of all persons and organizations similarly situated,
Plaintiffs,

vs.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; LEWIS R. SLATON as District Attorney of Fulton County, Georgia; and HERBERT T. JENKINS, as Chief of Police of the City of Atlanta, Georgia

CIVIL ACTION

No. 13676

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that, the above named plaintiffs, hereby appeal to the Supreme Court of the United States from judgment in this action dated the 24th day of August, 1970, in which the plaintiffs' application for an injunction was denied. This appeal is taken pursuant to 28 U.S.C. sec. 1253. This 18 day of September, 1970.

Attorney for Plaintiffs

s / MARGIE PITTS HAMES

MARGIE PITTS HAMES
210 Brighton Road, N. E.
Atlanta, Georgia 30309
355-8998

TOBIANE SCHWARTZ
153 Pryor Street, S. W.
Atlanta, Georgia 30303
524-5811

ELIZABETH ROEDIGER RINDSKOPF
551 Forrest Road, N. E.
Atlanta, Georgia 30312
522-9135

APPENDIX "E"

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE; PETER G. BOURNE; ROBERT HATCHER; LILLAS L. JAMES; JAMES WATERS; CORBETT TURNER; NEWTON LONG; EDWARD LEADER; WILLIAM H. BIGGERS; GEORGE VIOLIN; PATRICIA S. SMITH; JENNIE WILLIAMS; JUDITH BOURNE; SUZANNE DUNAWAY; JOYCE PARKS; LOU ANN IRION; MARY LONG; J. EMMETT HERNDON; SAMUEL L. WILLIAMS; EUGENE PICKETT; RICHARD DEVOR; DONALD DAUGHTRY; JUDITH ZORACH and KAREN WEAVER, residents of the State of Georgia; PLANNED PARENTHOOD ASSOCIATION OF ATLANTA, INC., a Georgia corporation; and GEORGIA CITIZENS FOR HOSPITAL ABORTION, INC., a Georgia corporation, for and on the behalf of all persons and organizations similarly situated,

Plaintiffs,

vs.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; LEWIS R. SLATON as District Attorney of Fulton County, Georgia; and HERBERT T. JENKINS, as Chief of Police of the City of Atlanta, Georgia

CIVIL ACTION

No. 13676

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that, the above named plaintiffs, hereby appeal to the Supreme Court of the United States from judgment in this action dated the 24th day of August, 1970, as amended by order entered October 13, 1970, in which the plaintiffs' application for an injunction was denied. This appeal is taken pursuant to 28 U.S.C. sec. 1253. This 30 day of October, 1970.

Attorney for Plaintiffs

s / MARGIE PITTS HAMES

MARGIE PITTS HAMES
210 Brighton Road, N.E.
Atlanta, Georgia 30309
355-8998

TOBIANE SCHWARTZ
153 Pryor Street, S.W.
Atlanta, Georgia 30303

ELIZABETH ROEDIGER RINDSKOPF
551 Forest Road, N.E.
Atlanta, Georgia 30312
522-9135

APPENDIX "F"

TEXT OF GEORGIA ABORTION STATUTE

Ga. Code § 26-1201. **Criminal Abortion**

Except as otherwise provided in Section 26-1202, a person commits criminal abortion when he administers any medicine, drug or other substance whatever to any woman or when he uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion. (Acts 1968, pp. 1249, 1277.)

26-1202. **Exception**

(a) Section 26-1201 shall not apply to an abortion performed by a physician duly licensed to practice medicine and surgery pursuant to Chapter 84-9 or 84-12 of the Code of Georgia of 1933, as amended, based upon his best clinical judgment that an abortion is necessary *because:*

(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or

(2) The fetus would be very likely be born with a grave, permanent, and irremediable mental or physical defect; or

(3) The pregnancy resulted from forcible or statutory rape.

(b) No abortion is authorized or shall be performed under this section unless each of the following conditions is met:

(1) The pregnant woman requesting the abortion certifies in writing under oath and subject to the penalties of false swearing to the physician who proposes to perform the abortion that she is a bona fide legal resident of the State of Georgia.

(2) The physician certifies that he believes the woman is a bona fide resident of this State and that

he has no information which should lead him to believe otherwise.

(3) Such physician's judgment is reduced to writing and concurred in by at least two other physicians duly licensed to practice medicine and surgery pursuant to Chapter 84-9 of the Code of Georgia of 1933, as amended, who certify in writing that based upon their separate personal medical examinations of the pregnant woman, the abortion is, in their judgment necessary *because of one or more of the reasons enumerated above.*

(4) Such abortion is performed in a hospital licensed by the State Board of Health and accredited by the Joint Commission on Accreditation of Hospitals.

(5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

(6) If the proposed abortion is considered necessary because the woman has been raped, the woman makes a written statement under oath, and subject to the penalties of false swearing, of the date, time and place of the rape and the name of the rapist, if known. There must be attached to this statement a certified copy of any report of the rape made to any law enforcement officer or agency and a statement

by the solicitor general of the judicial circuit where the rape occurred or allegedly occurred that, according to his best information, there is probable cause to believe that the rape did occur.

(7) Such written opinions, statements, certificates, and concurrences are maintained in the permanent files of such hospital and are available at all reasonable times to the solicitor general of the judicial circuit in which the hospital is located.

(8) A copy of such written opinions, statements, certificates, and concurrences is filed with the Director of the State Department of Public Health within ten (10) days after such operation is performed.

(9) All written opinions, statements, certificates, and concurrences filed and maintained pursuant to Paragraphs (7) and (8) of this subsection shall be confidential records and shall not be made available for public inspection at any time.

(c) Any solicitor general of the judicial circuit in which an abortion is to be performed under this section, or any person who would be a relative of the child within the second degree of consanguinity, may petition the superior court of the county in which the abortion is to be performed for a declaratory judgment whether the performance of such abortion would violate any constitutional or other legal rights of the fetus. Such solicitor general may also petition such court for the purpose of taking issue with compliance with the requirements of this section. The physician who proposes to perform the abortion and the pregnant woman shall be respondents. The petition shall be heard expeditiously and if the court adjudges that such abortion would violate the constitutional or other legal rights of the fetus, the court shall so

declare and shall restrain the physician from performing the abortion.

(d) If an abortion is performed in compliance with this section, the death of the fetus shall not give rise to any claim for wrongful death.

(e) Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b) (5). A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person.

26-1203. **Punishment**

A person convicted of criminal abortion shall be punished by imprisonment for not less than one nor more than 10 years. (Acts 1968, pp. 1249-1280.)